IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 41/2005

Shri Jose Paulo Fernandes (deceased)
and Shri Filligonia Fernandes. ..... Appellant.

V/s.

Dr. Albert D'Souza and others. ..... Respondents.

Shri Zeller de Souza, Advocate for the appellant.

Shri P. S. Rao, Advocate for respondents No. 4 & 7.

CORAM : P.V. KAKADE, J..

Date : 7th November, 2006.

P.C.

This is an appeal preferred by the unsuccessful plaintiff against the order passed by the Addl. District Judge, South Goa, Margao dismissing the appeal and confirming the order passed by the trial Court dismissing the suit and partly allowing the counter claim of the defendant No.1 which resulted in declaration to the effect that the legal heirs of defendant No.1, plaintiff to the counter claim, are owners in possession of the suit property with the exclusion of the area of 300 sq. metres sold to defendant No.4. It was further declared that the name of plaintiff No.1 to

the suit, who was defendant No.1 in the counter claim as well as names of Venefrida and Taumaturgo Fernandes be deleted from the record and consequent directions were issued to the concerned authorities.

2. I have heard the learned Counsel for both the parties. Perused the record.

3. The plaintiffs-appellants filed suit for declaration and consequential relief against defendants No.1 to 4, claiming therein that there existed landed property known as “Posrea Molla” locally known as “Khursa Bhat” situated at Cavorim, Chandor, Salcete, Goa consisting one residential house and registered in the Land Registration Office under No. 33235. It is submitted that the suit property originally belonged to late mother of the plaintiff No.1, namely Maria Feliz Amalterzinha Venefrida das Dores Gracias and was entered in her name in the Land Registration Office of Salcete. The said late mother of the plaintiff No.1 gifted the suit property vide Deed of Gift dated 28.8.1958 in favour of plaintiff No.1. The deed of gift was drawn in the presence of notary gifting in favour of the plaintiff No.1 her disposable quota. The said mother Maria reserved the usufruct in her favour with regard to the suit property and, therefore, the income of which was enjoyed by her during her life time. The said

Maria, the mother of plaintiff No.1 used to reside in the house existing in the suit property, which was thereafter granted on licence basis to the defendant No.4. The said residential house subsequently collapsed, but the defendant No.4 without the permission or the consent of the plaintiffs constructed a hut in the suit property. The plaintiffs came with a case that about one year ago, prior to the filing of the suit, the mother Maria expired and the plaintiffs became the owners of the suit property.

Somewhere in the year 1988, the plaintiff No.1 came across notice dated 19.10.1988 disclosing that suit property had been sold by Deed of Sale registered under No.1218 dated 14.8.1981 and objections were called for mutation. Subsequently, the plaintiffs managed to get a copy of the sale deed and came to know that the entire suit property was sold in favour of the defendant No.1 by the said late Maria. It was also alleged by the plaintiffs that they also came to know that said Maria had obtained a decree of eviction against the defendant No.4 in Regular Civil Suit No.146/79, which was later on assigned in favour of the defendant No.1 of which fact the plaintiffs were not aware and hence, it was claimed that the said transfer in favour of the defendant No.1 and thereafter in favour of the defendant No.4 with regard to an area of 300 sq. metres was not binding on the plaintiffs nor it affects the rights and title of the plaintiffs over the suit property and late Maria was not entitled to dispose of the suit property.

Hence, the suit came to be filed for declaration that the sale deed should be declared as null and void and also prayed for injunction restraining the defendants from selling the suit property or portion thereof to any person or persons.

4. The defendants contested the suit, inter alia, denying the allegations made by the plaintiffs by filing written statement, together with counter claim that the suit property existed as stated in the plaint. However, according to the defendant No.1, defendant No.4 purchased the suit property from late Maria by registered sale deed dated 14.8.1981 and the Deed of Gift could not be taken into consideration since it was not registered in the Land Registration Office. It was further contended that he was the absolute owner in possession of the suit property since he purchased the suit property and a part of which was sold by the defendant No. 4 by way of Deed of Sale dated 17.6.1983 and the defendant No.4 was the absolute owner in possession of the said part of the property and on such and other grounds, the suit was sought to be dismissed.

Defendant No.4 also filed written statement submitting that he started residing in the said house with the permission of the *bhatkar,* namely Maria for more than 30 years as *mundkar* and not as lessee. He also admitted filing of Regular Civil Suit No.146/79 against him for

eviction by the said Maria as well as order dated 6.3.1980 passed in it.

5. On the basis of these pleadings, the trial Court proceeded to adjudicate the dispute on merits and came to the conclusion that the plaintiffs had partly proved that the suit property was gifted to the plaintiff by deed of gift dated 28.8.58 from his share. However, the plaintiffs failed to prove that defendant No.4 resided in the suit property as licensee. Further it was held that the plaintiffs also failed to prove that the sale deeds dated 14.8.81 and 17.6.83 were null and void and, as such, the suit came to be dismissed and the counter claim was partly decreed, as noted above.

6. An appeal was carried to the District Court. Learned Addl. District Judge, Margao after hearing both the parties thought it fit to concur with the findings recorded by the trial Judge holding that it was a fit case to invoke the provision of Section 41 of the Transfer of Property Act (hereinafter referred to as “the said Act”) and as such, the appeal came to be dismissed. Hence, the present appeal.

7. At the outset, it may be noted that the learned Counsel for the appellants sought to raise two so called substantial questions of law. It was

submitted that by virtue of Article 2209 of the Portuguese Civil Code, the suit ought not to have been dismissed and further that the findings recorded by both the Courts below to the effect that the case was covered by the provision of Section 41 of the said Act was wrong and, therefore, dismissal of the suit was not legal.

8. In this regard, I must note at this juncture that both the Counsel have taken me through the evidence on record extensively and I do not see any infirmity or perversity in the findings recorded by the Courts below. The moot question sought to be raised is regarding application of Section 41 of the said Act and whether it is liable to be applicable to the factual matrix involved in the dispute. Now, a perusal of the provision of Section 41 of the said Act, reveals that four essential ingredients are required to be fulfilled before application of this provision, namely (i) ostensible ownership of the transferor; (ii) with express or implied consent of the real owner; (iii) payment of consideration by the transferee; and (iv) good faith and reasonable care on his part to ascertain the power of the transferor to transfer the property. On perusal of the entire evidence on record, it is clear that if these principles contemplated under Section 41 of the said Act are applied to the facts of this particular case at hand, one thing is clear that the deed of gift was executed in the year 1958 before the

notary and it was a private document between two parties. The said gift deed was never registered before the registration office in order to inscribe the right of the plaintiff No.1 in the suit property. It is also an admitted fact that the suit property and more particularly the house existing therein was occupied by said Maria alone. Further the said property was inscribed solely in the name of said Maria as widow and, therefore, no other person was having any right in it. Therefore, said Maria was shown as the owner in possession of the suit property till she executed the deed of sale in favour of the defendant No.1 in the year 1981. It is also to be noted that even though the plaintiff No.1 was having right in the suit property by way of gift deed, he never exercised his right nor any such evidence was produced on record by him. In these circumstances, both the Courts have concluded that it is a fit case covered under Section 41 of the said Act and I do not see any reason why I should not concur with them when, essentially, the question sought to be raised at this stage is a mixed question of law and facts which is properly appreciated by the Courts below.

9. Time and again, the Apex Court has held that the concurrent findings of facts, howsoever erroneous, cannot be disturbed by the High Court in exercise of the powers under section 100 of the C.P. Code. It is not within the domain of the High Court to investigate the grounds on

which the findings were arrived at, by the last court of fact, being the first appellate court. In view of this position, when the reasoning adopted by the Courts below while reaching to the concurrent findings are seen to be not perverse and found to be based on available material on record, I do not see any reason to interfere with the said findings.

11. In the result, the appeal is devoid of any merits and stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.